

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

ROSITA SIERRA MEDRANO,)	No. CV-F-08-529 OWW
)	(No. CR-F-03-5237 OWW)
)	
Petitioner,)	ORDER DIRECTING PETITIONER
)	TO FILE FIRST AMENDED
vs.)	MOTION TO VACATE, SET ASIDE
)	OR CORRECT SENTENCE PURSUANT
)	TO 28 U.S.C. § 2255 WITHIN
UNITED STATES OF AMERICA,)	30 DAYS OF FILING DATE OF
)	ORDER
)	
Respondent.)	
)	
)	

On April 16, 2008, Petitioner Rosita Sierra Medrano filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Petitioner pleaded guilty pursuant to a written Plea Agreement to possession of 50 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1). The Plea Agreement provided:

The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, the defendant knowingly waives the right to appeal her conviction and similarly waives the right to appeal any

1 sentence (or the manner in which the sentence
2 was determined) which is less than 88 months,
3 on the grounds set forth in Title 18, United
4 States Code, Section 3742 or on any ground
5 whatever, in exchange for the concessions
6 made by the United States in this plea
7 agreement. The defendant also waives her
8 right to challenge his [sic] conviction,
9 sentence or the manner in which it was
10 determined in any post-conviction attack,
11 including but not limited to a motion brought
12 under Title 28, United States Code, Sections
13 2241 or 2255, regardless of her ultimate
14 sentence.

15
16 Petitioner was sentenced on November 22, 2005 to 168 months
17 incarceration. Petitioner did not file a Notice of Appeal.

18
19 Petitioner asserts several grounds for relief.

20
21 She asserts that she was denied the effective assistance of
22 counsel because counsel because counsel did not advise of the
23 consequences of the Plea Agreement, or that "by signing the plea
24 she was waiving all her constitutional rights". Petitioner
25 contends that she "was misinformed as to his [sic] right to have
26 the charged drug quantity proved to a jury, and because he [sic]
did not admit drug quantity at her plea allocution [sic]," her
guilty plea was not knowing, voluntary or sufficient to support
the judgment of conviction. Petitioner also contends that
counsel was ineffective because counsel "never explain to
petitioner the presentence report." Petitioner contends that she
was denied the effective assistance of counsel because counsel
"improperly warn[ed] her of the frightful consequences of appeal"
and because counsel failed to file an appeal after Petitioner
requested that he do so.

1 Petitioner asserts as further grounds for relief that her
2 sentence was based on materially incorrect information, that
3 Petitioner "should have been advised that if an appellant
4 receives a harsher punishment on resentencing following an
5 appeal, a presumption of vindictiveness attaches" and asserts
6 "there is an improbability verging on impossibility that a
7 defendant in Sierra-Medrano [sic] would or could receive a
8 harsher sentence following an appeal."

9 Section 2255 provides that a one-year period of limitation
10 applies to a Section 2255 motion, which limitation period runs
11 from the latest of:

12 (1) the date on which the judgment of
13 conviction became final;

14 (2) the date on which the impediment to
15 making a motion created by governmental
16 action in violation of the Constitution or
17 laws of the United States is removed, if the
18 movant was prevented from making a motion by
19 such governmental action;

20 (3) the date on which the right asserted was
21 initially recognized by the Supreme Court, if
22 that right has been newly recognized by the
23 Supreme Court and made retroactively
24 applicable to cases on collateral review; or

25 (4) the date on which the facts supporting
26 the claim or claims presented could have been
discovered through the exercise of due
diligence.

Applicable here is Section 2255(4). In *Calderon v. U.S. Dist.*
Court for Central Dist. of Cal., 128 F.3d 1283 (9th Cir. 1997),
cert. denied, 522 U.S. 1099 and 523 U.S. 1061 (1998), *overruled*
on other grounds, 163 F.3d 530 (9th Cir. 1998), the Ninth Circuit

1 held that the one-year limitations period applicable to Section
2 2255 motions is subject to equitable tolling. However, the Ninth
3 Circuit further held:

4 Equitable tolling will not be available in
5 most cases, as extensions of time will only
6 be granted if 'extraordinary circumstances'
7 beyond a petitioner's control make it
8 impossible to file a petition on time ... We
9 have no doubt that district judges will take
10 seriously Congress's desire to accelerate the
11 federal habeas process, and will only
12 authorize extensions when this high hurdle is
13 surmounted.

14 Id. at 1288-1289.

15 Petitioner alleges no facts from which it may be determined
16 that her Section 2255 motion is timely filed or that she is
17 entitled to equitable tolling of the one-year limitation period.

18 Because it appears from Petitioner's motion that it may be
19 untimely, Petitioner is directed to file within 30 days of the
20 filing date of this Order an amended Section 2255 motion setting
21 forth the grounds upon which she seeks relief and the facts upon
22 which she relies in contending that her motion is timely filed or
23 that she is entitled to equitable tolling. Failure to timely
24 comply will result in the dismissal of her Section 2255 motion as
25 untimely.

26 IT IS SO ORDERED.

Dated: May 5, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE